

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ANDREW EASTON,

Defendant-Appellant.

UNPUBLISHED

December 17, 2013

No. 312114

Wayne Circuit Court

LC No. 12-003261-FH

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, and domestic violence, MCL 750.81(2). Defendant was sentenced to 113 days in jail, with credit for 113 days served, and to 18 months' probation. We affirm.

This case arises out of defendant's arrest following a physical altercation with his live-in girlfriend, Sandra Altgelt, in the early morning hours of March 22, 2012. Both defendant and Altgelt testified at trial. There apparently were no other witnesses to the altercation, as the only additional witnesses at trial were the police officers who arrived on the scene after the altercation had ended.

Altgelt testified that defendant assaulted her after she woke him up and informed him that the police had been at the house searching for a runaway girl who was a friend of his son. Altgelt testified that after she made defendant something to eat, he started screaming at her, yelling that she hated his son, and then pushed her across the room by pushing her in her chest. Altgelt also testified that defendant attempted to choke her three times by placing both hands on her neck. The first time she kicked him; the second time she bit his thumb; the third time she pretended to pass out. Altgelt then testified that defendant struck her in the back of the head, across her back, and in her face and left arm with a wooden stick, which resulted in her left forearm bleeding. She identified the stick in evidence as the one defendant used to strike her and testified that her blood was on the stick. She also testified that "there was a trail of blood from the living room all the way to the kitchen going outside," as she had left the house by going through the kitchen.

Defendant confirmed that Altgelt was his girlfriend and that they had lived together for about nine or ten months at the time of the incident. He testified that he and Altgelt started

arguing after she woke him up to go to the store. While he denied ever using the stick to strike Altgelt, he conceded that after Altgelt refused to leave the residence as he requested, he pushed her toward the door in an attempt to get her of the house. He also admitted placing Altgelt in a partial headlock while trying to get her out of the house. Defendant testified that it was while he had Altgelt in a headlock that she bit his thumb, which was bitten so badly that blood was “squirting out” all over the place, getting all over the house and on the side of Altgelt’s face. He testified that the blood on the stick was his, as he had picked up the stick, which was in the house to help secure the basement door, only so he could get the door open to push Altgelt out of the house. He specifically denied hitting Altgelt with the stick. He also claimed that Altgelt’s injuries resulted from her falling down during the struggle.

Three police officers testified at trial. Two of the police officers testified to seeing blood on Altgelt; none of them testified to seeing any blood on defendant. The officers confirmed that Altgelt told them that defendant had beaten her with the stick, which she was able to identify after it was located by the police. The officers also observed marks on Altgelt’s body. While the wooden stick was placed into evidence, no DNA testing or other scientific analysis was performed on the stick. Therefore, there was no scientific evidence introduced at trial regarding whose blood was on the stick, or for that matter, throughout the house.

Defendant waived his right to a jury trial. The trial court found defendant guilty of felonious assault for having used the stick and also guilty of domestic violence. The court stated that it did not find either version of events completely truthful. However, the trial court did not find defendant’s testimony that the blood on the stick belonged to him to be realistic, given defendant’s testimony that blood was everywhere due to his thumb being bitten. The court reasoned that, if defendant’s testimony were true, more blood would have been present on the stick.

Defendant first argues that the trial court clearly erred when it found that the blood on the stick belonged to Altgelt, as opposed to him. Defendant claims that because there was no DNA evidence confirming that the blood was Altgelt’s, nor any scientific evidence regarding blood patterns, the trial court impermissibly relied on facts outside the record in making its factual determination. We disagree.

The trial court’s factual findings are reviewed for clear error. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding of fact is considered “clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.” *Id.*

“A judge who sits without a jury in a criminal trial must make specific findings of fact and state conclusions of law.” *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). The trial court’s factual findings are sufficient as long as it appears that the court was aware of the issues in the case and correctly applied the law. *People v Lanzo Constr Co*, 272 Mich App 470, 479; 726 NW2d 746 (2006). In addition, the trier of fact is entitled to “make reasonable inferences from the facts” so long as those inferences are “supported by direct or circumstantial evidence.” *People v Legg*, 197 Mich App 131, 132; 494 NW2d 2d 797 (1992); see also *People v Metzler*, 193 Mich App 541, 547; 484 NW2d 695 (1992).

Defendant contends that because there was no expert testimony regarding Altgelt's injury patterns, blood clotting, or blood splatter, the trial court relied "on speculation to conclude that more blood should have been on the stick." Defendant cites *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785 (1991), for the proposition that while "factfinders may and should use their own common sense and everyday experience in evaluating evidence . . . the scope . . . is limited strictly to a few matters of elemental experience in human nature, commercial affairs and everyday life."

Defendant's reliance on *Simon*, however, is misplaced as that case is easily distinguishable. *Simon* dealt with a drug raid and subsequent trial. *Id.* at 566. There, the trial court relied on its own former experience as a prosecutor, stating that the court "kn[e]w something about the way the police perform raids" and did not believe the defendant's testimony because there would not have been enough time "to run from the bedroom [and] return and hide in the closet without being apprehended." *Id.* at 567. This Court held that the trial court erred because it "convicted [the] defendant based in part on specialized knowledge not in evidence[.]" as opposed to "common sense and everyday experience," and did not rely "solely on the evidence presented at trial." *Id.* at 567-568.

In contrast, here, the trial court specifically relied on its common sense and everyday experience in determining how much blood would have been on the stick and in the home if defendant's testimony were true. Specifically, the trial court compared defendant's testimony concerning his bleeding thumb to what occurs when one nicks himself while shaving, noting that at times it can take an hour for the nick to stop bleeding. The court noted that while the stick had some blood on it, defendant's version of events should have resulted in the stick being "coated in blood." Relying on one's own experience from previously bleeding to conclude that there would have been more blood on the stick is not specialized knowledge, but rather common sense and everyday life experience.

In addition, the trial court's finding of fact was supported by the testimony of Altgelt, who testified that she started bleeding after being hit in the forearm by the stick, and that the blood on the stick (and throughout the house) was hers. Two police officers confirmed seeing blood on Altgelt, and one testified that he specifically observed her bleeding. In addition, no officer testified about seeing any blood on defendant. Thus, while defendant testified that the blood was his, there was sufficient direct and circumstantial evidence presented at trial to permit the court to conclude that the blood was Altgelt's, especially given the trial court's ability to gauge the credibility of the witnesses before it. See *People v Tanner*, 222 Mich App 626, 635; 564 NW2d 197 (1997). We perceive no clear error in the trial court's finding on this issue.

Defendant next argues that the prosecution presented insufficient evidence to support his convictions. We again disagree. We review the evidence "in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Lanzo Constr Co*, 272 Mich App at 474.

The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places

another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A person commits domestic violence if he or she assaults or batters someone with whom he or she lives or is dating. MCL 750.81(2).

There was sufficient evidence to establish that Altgelt was assaulted with the stick. Specifically, Altgelt testified that defendant struck her with the stick on the back of the head, across her back, and on her face and left arm. Photographs established bruising around her eye, showed that the tip of her ear was red, and revealed marks behind her ear. This evidence, in addition to the additional evidence of blood on the stick, was sufficient to prove beyond a reasonable doubt that Altgelt had been assaulted by defendant, and that the assault also included the use of the stick. The use of a stick to assault someone satisfies the second element of the crime of felonious assault, i.e., the use of a dangerous weapon. See *People v McCadney*, 111 Mich App 545, 548-549; 315 NW2d 175 (1981); see also *People v Scurry*, 153 Mich App 437, 439-440; 395 NW2d 342 (1986).

Given defendant’s admission that he pushed Altgelt and placed her in a headlock before he allegedly used the stick to strike her, there was also sufficient evidence to conclude beyond a reasonable doubt that defendant acted with the intent to injure Altgelt or place her in apprehension of an immediate battery. This is especially true given that intent can be inferred from a defendant’s actions. See *People v Williams*, 6 Mich App 412, 419; 149 NW2d 245 (1967). In view of defendant’s theory of the case, as well as the evidence presented at trial, there simply can be no explanation for defendant beating Altgelt with a stick unless he intended to cause a battery or a reasonable apprehension of injury. The trial court did not err when it concluded, as the trier of fact, that the prosecution had proven all three elements of felonious assault beyond a reasonable doubt. In addition, defendant admitted that Altgelt was his girlfriend with whom he lived; therefore there was also sufficient evidence to convict him of domestic violence.

Lastly, defendant asserts that he is entitled to a new trial because his trial attorney was constitutionally ineffective. Specifically, defendant claims that his counsel had a duty to ensure that the blood on the stick was tested for DNA, as such a test would have exonerated him by establishing that the blood was his. We disagree.

Because no *Ginther*¹ hearing took place, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney’s performance “fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel’s error.” *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant bears a heavy burden of showing that counsel’s performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant's sole defense to the charge of felonious assault was that he did not use the stick to beat Altgelt. In support of this defense, defendant testified that the blood on the stick was not Altgelt's, but his, and that it got on the stick when he grabbed the stick while trying to get Altgelt out the door. Had defense counsel chosen to have the blood on the stick analyzed for DNA, counsel would have risked not being able to use the only defense advanced at trial, i.e., that the blood was defendant's rather than Altgelt's. Advancing this defense, and ensuring that the defense could be used and not attacked by the use of DNA evidence to undermine it, were clearly matters of trial strategy, an area where counsel is given wide discretion. See *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Here, defendant simply cannot overcome "the strong presumption that defense counsel's decisions constituted sound trial strategy." *Id.*

In addition, defendant has not shown that the results of his trial would have been different had a DNA test been performed. Defendant has failed to provide any evidence that a DNA test would have established that the blood on the stick was only his, and that none of the blood on the stick was Altgelt's. He has also failed to establish that, even if the DNA test confirmed that the blood on the stick was his, this would have resulted in the trial court discrediting Altgelt's testimony. Accordingly, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly